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ABSTRACT

Since "New York Times Co. versus Sullivan," the amount of money spent on libel suits brought against the media, and the amount of money awarded to litigants, has skyrocketed. Most people who file such suits against the media are not seeking monetary damages, but only vindication for damage to their name and reputation. However, they may spend millions on legal fees, only to have a favorable decision overturned during appeals. In response, many juries award huge sums to some litigants to make up for others who receive nothing. Insurance against libel has become prohibitively expensive as well. Part of the problem of winning such cases is the stipulation that litigants must prove malice on the part of the media, which is nearly impossible, but nonetheless forces lawyers and juries to spend hours looking over journalists' papers and notes. A reasonable alternative can be found in the Bible, which suggests, in many places, that the goal in punishment for libel is "to make whole" rather than award vindictively high monetary sums. Plaintiffs would no longer have to prove malice, leaving punishment for such evil intentions to God; rather, the courts would only have to determine that libel had been committed and speedily award reasonable damages to those defamed. Finally, the media would be more careful in checking sources, since falsehood would always be swiftly punished. (Thirty end notes are provided.) (JC)

LIBEL: UTILITARIA' "JSTICE VS. BIBLICAL TRUTH-TELLING

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LIBEL: UTILITARIAN JUSTICE VS. BIBLICAL TRUTH-TELLING

Why has libel law since Times v. Sullivan[1] been in such turmoil? Why have we seen deposition misery for reporters, financial pain for publishers, and a tendency among juries to ignore judicial rulings in order to punish falsehood? This article examines current libel problems and the judicial thinking that led to them, and then proposes a Biblical alternative to current libel practice.

Background

Multi-million dollar libel awards have become common during the 1980s. Even when they win, many press organizations lose. CBS spent $6 million in the Westmoreland case before the general gave up, realizing he could not prove that CBS had willfully lied. ABC spent about $7 million on another case. Time magazine survived the suit of Israel's Ariel Sharon, but at a cost of $3 million. Plaintiffs also pay: Westmoreland and his supporters spent $4 million in a fruitless search for vindication.[2]

Journalists see big defamation suits as "horror stories," but when the telescope is turned around, there is horror in what some publications have done. Healthy individuals have been said to have leprosy, venereal disease, or mental illness. A baton-twirling Miss Wyoming sued after a baton-twirling character with that title was depicted as sexually promiscuous and immoral.

Hustler magazine lied in depicting Jerry Falwell as an incestuous drunkard.[3]

Some journalists cite instances of libel claimants who seemed more interested in political advantage or monetary gain than in justice. More impressive, though, are the number of instances of libel claimants being doubly abused, first by publication of defamatory falsehood and second by the reaction of journalists when they complain. According to a University of Iowa survey, many individuals seeking corrections or apologies are chased out of newspaper offices, with reporters screaming, "---- you, you're full of ----." No surprise, the Chicago Tribune's city editor noted: "The rudeness in this business is legendary."[4]

Journalists who are neither reckless nor rude also are harmed by the sins of the fatheads. Libel insurance rates for many newspapers doubled during 1986. One family-owned group of seven small newspapers in eastern Tennessee has never lost a lawsuit. Only one current case is requiring a lawyer. Yet, the newspapers' premiums for 1986 were increased by 99 percent. A small Christian magazine that has never had a libel suit cannot find even minimal libel insurance for less than $10,000.[5]

Libel has become such a deep pit for journalists that many are wondering about the continued existence of independent journalism. Soaring litigation costs threaten to put some publications out of business. Other publications are becoming so fearful of any possibility of libel that their editors look for softsoap rather than hard-hitting coverage. Independent

journalism also is threatened by those suggesting government regulation of newspaper content, with the goal of bringing about "fairness" but the likelihood of introducing a form of state censorship.[6]

Three major non-legal answers to the libel crisis, and many minor ones, are trotted out regularly.

First, some continue to propose development of national and local "news councils," groups of citizens that would, in a non-judicial setting, listen to complaints about media coverage. If the news councils were to find media fault, potential litigants would feel vindicated and news organizations could publish retractions or corrections.

News council proposals have a lot going for them, since some defamed individuals (according to the University of Iowa study) are mainly looking for a way to have their names cleared quickly. But only a few news organizations have supported the news council approach. Many legitimately fear outside involvement in their editorial processes. Many wonder about self-appointed memberships of news councils. From the plaintiff side, the news council alternative is less satisfactory than efficient judicial proceedings would be, because news councils have no authority to enforce judgments or award damages.[7]

Second, some editors continue to advocate self-policing by journalists, with the emphasis on making full and immediate corrections whenever there is doubt about accuracy or fairness. But, in the absence of spiritual changes among reporters and editors, the arrogance of newsroom power may make self-policing a delusion. A Washington Journalism Review article suggested that

reporters "should be more polite, respectful, long-suffering and never even a bit arrogant, no matter how overbearing, boorish or criminal the abusive slob on the other end of the phone may be." As long as there is a tendency to think of the complainant, who may have been smeared unfairly, as an "abusive slob," not much will change.[8]

Third, some predict that changing policies of libel insurance companies will have an effect. The largest libel insurer now requires news organizations to pay 20 percent of all legal fees and expenses above the deductible, generally $2,500 to $20,000, depending on newspaper size. Insurance companies believe that co-insurance rules will force news organizations to keep a tighter rein on their legal firms' expenses, and will also encourage some quick out-of-court settlements.

The new libel insurance policies may change the behavior of some media litigants. Many news organizations have had no-settlement policies, contending that their refusal to compromise would deter frivolous suits and show a willingness to fight for truth to the last dollar (the insurance company's dollar, that is). Now that news organizations have to share the costs, industry leaders such as the Los Angeles Times risk manager say that when the going gets tough, "We'll find a way to settle." The drawback, though, is that financial compromise will not bring reputational restitution. Plaintiffs and their lawyers may walk off with some cash, but they will not have what the University of Iowa survey indicates some most want: A clear judicial statement that they were wronged.[9]

At journalistic conventions and meetings, other partial "solutions" have been discussed. Sooner or later, though, almost everyone comes back to the current state of libel law. That is an unhappy subject -- even Journalism Quarterly has decried "the disarray that is libel law today" -- but an inescapable one. Courts are the only institutions with authority to present judgments and enforce penalties, and it is to the courts that we must now turn.[10]

Digging the pit

A 1964 Supreme Court decision, New York Times v. Sullivan, opened the door for disarray. The Court decided that a public official could no longer win a libel case by showing that published defamatory falsehood had injured his reputation. Justice William Brennan, writing for the majority, specified that the plaintiff could win only by proving that the published story "was false, and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true."[11]

The "and" was key: Brennan was breaking with centuries of English and American common law tradition. Previously, defamatory falsehood by journalists always was potentially punishable, unless it was a generally accurate account of a public proceeding or record, or unless it was opinion based on facts truly stated (most opinions by their nature are not provably true or false). But Brennan was trying to transform what had been issues of right and wrong into utilitarian questions of the greatest good for the greatest number: How do we balance competing claims in order to protect press freedom?

Brennan's expressed concerns had validity. He wanted to prevent government from using civil libel penalties to inhibit journalists who did have legitimate criticism of public officials. If reporters were to need full factual documentation to criticize officials, and if those officials withheld necessary facts or had the power to do so, then truth-telling would be hamstrung. But Brennan went further, arguing that even stories that could be proven false should be legally permissible as long as they concerned public officials. (Some errors might result in the process, but if omelets are to be made, eggs must be cracked.)

A majority of justices agreed: After Sullivan, journalists could print defamatory falsehoods about public officials and rest easy, unless it could be proven that the journalists had deliberately lied. That was extremely difficult to do, unless the journalist had been foolish enough to proclaim his intention to lie in a crowded barroom full of sober witnesses. There was also the "reckless disregard" clause to fall back on, but the Supreme Court soon interpreted that to mean "something much more than gross negligence; reckless disregard... approaches the level of deliberate fabrication" and "must reflect a conscious awareness of probable falsity." In other words, recklessness had to include malice.[12]

One law professor praised Brennan's decision for its willingness to uphold "the strategic sacrifice of some deserving plaintiffs to the more important, at least to society as a whole, goals of the first amendment."[13] That law professor, like a high

priest two thousand years ago, evidently believed that it was right for one man to be defamed for the good of the people. But others have asked: Is this fair?

For instance, why did Leonard Damron have to be sacrificed? Shortly after the Sullivan decision, a Florida newspaper falsely reported that Leonard Damron, small city mayor and candidate for tax assessor, was indicted for perjury in a local court. The indicted man actually was Leonard's brother, James, with whom Leonard had no official or business connections. Leonard Damron lost the election and convincingly showed harm to his business. A jury found libel. The Supreme Court let off the newspaper with no penalty at all, since the defamatory article related to qualifications of a public official and candidate for public office, and deliberate lying could not be proven.[14]

Was it good for Leonard Damron to be defamed for the good of the people? The Supreme Court said yes. But if Damron must be sacrificed, why not others? Looking through some recent cases, we see that public officials who have been sacrificed for the good of the people include a waterworks auditor, a county motor pool administrator, a county airport board member, and a county social worker.[15]

Was it good for those minor public officials to be sacrificed for the good of the people? If the answer if yes, what about "public figures," prominent individuals outside of government? The Supreme Court, in several early 1970s cases, declared that "public figures" also would have no recourse when they were victimized by published falsehoods, unless they could prove malicious lying.[16]

Again, looking through some recent cases: Public figures sacrificed for the good of the people include officers of a taxpayers' association involved in a controversy over an appropriation for a new firehouse; a person who circulated a petition regarding a voter referendum on county land acquisition and purchased newspaper ads concerning it; a member of a civic organization who wrote a letter to a newspaper editor concerning a public issue; and a physician who participated in a public debate concerning flouridation.[17]

Some of the cases seemed particularly unjust, and particularly likely to inflame public resentment of news media. For example, the major figures in the taxpayers' association controversy were Alonzo Lawrence and James Simpson, two senior citizens who in 1974 were volunteer president and secretary-treasurer, respectively, of the Rahway (New Jersey) Taxpayers Association. Rahway municipal authorities wanted to build a new firehouse, but Lawrence and Simpson led a successful campaign to get over 5,000 signatures on petitions requesting a referendum on appropriations for the firehouse.

It turned out that some of the signatures were illegitimate for reasons such as a husband signing for his wife or vice versa. Typically, during petition drives, many signatures are thrown out for such reasons. But this time, an inexperienced reporter on the Rahway News-Record thought she had a scoop, and the following headline resulted: "Forgery charges may loom for Lawrence, Simpson." A New Jersey jury found that headline and the accompanying story falsely defamatory, but the New Jersey Supreme

Court decided that both Lawrence and Simpson were public figures who would have to prove actual malice or reckless disregard (in the sense of premeditated misstatement rather than mere incompetence).[18]

New Jersey Supreme Court Justice Schreiber filed a dissenting opinion, arguing that, because of the majority's decision, "Two highly motivated senior citizens are left without redress for libelous publications holding them up to contempt and ridicule in the community in which they have lived for many years. This is the result of their sincere attempt to participate in local government." But the U.S. Supreme Court refused to hear their case, as only Justice William Rehnquist was willing to grant review.[19]

Those who placed public officials and public figures in journalistic free fire zones were not entirely indifferent to their fate. Judges suggested that such individuals could use their positions or community prominence to defend themselves against false charges. It turned out, though, that some public officials or public figures had that capacity, but many did not. Lawrence and Simpson did not have much beyond a mimeograph machine to use in clearing their names. Even a major public official or public figure could be a big fish in a small barrel when 60 Minutes comes shooting.

Slowly, even some utilitarians started complaining about the inequity of governments protecting certain classes of individuals and not others. Just as critics of affirmative action have questioned the justice in an affluent, well-educated black receiving preference over a white coalminer's son, so lawyers

were raising questions about a powerful private individual getting more protection from press attacks than a minor public official. Wasn't justice supposed to be blind? Were not mitigating circumstances supposed to take into account individual situations, not group claims?

Falling into the pit

The questions were being raised, but many journalists were sanguine, until one other problem developed.

When the Supreme Court announced its Sullivan decision in 1964, philosopher Alexander Meiklejohn predicted that journalists freed from many libel concerns would be "dancing in the streets." It appeared to columnist Anthony Lewis and others that few public officials (and, later, public figures) would be foolish enough to bring suit: What reasonable individuals, faced with the difficulty of proving what Justice Brennan had defined as "actual malice" -- that subjective intention to lie -- would want to waste their time and money? Even if they made the effort, it appeared inevitable that judges would see the scanty evidence and make summary dismissals. Even if judges should allow jury trials, juries composed of reasonable men and women would learn the Court's easy-to-remember code words -- "absence of malice" -- and refuse to convict. Game, set, match.[20]

There remained only one threat to journalists within the Brennan dispensation: What if plaintiffs, juries, lawyers, and even some judges were not reasonable? If plaintiffs went against the odds and actually tried to prove malice, then legal

costs could become much greater than under the old system of truth or falsehood. After all, it does not take long to read and analyze a newspaper article, but if it is necessary to read through long files and take depositions on comments made and states of mind, legal bills mount. When lawyers have hourly rates of $190 to $250 in New York and San Francisco, or $80 to $125 in smaller markets, the bills mount fast.

The threat became reality, for four reasons.

First, many defamed individuals did not give up. They continued to bring suit, despite the odds against them imposed by the proof-of-malice gauntlet. The University of Iowa study showed how desperate many plaintiffs are: "They know that victory is unlikely, and that the final decision is likely in any event to be ambiguous and distant." But they still sue, and not for money, according to the study: "Money is rarely the reason for suing. They sue to correct the record and to get even."[21]

Second, some juries showed their respect for attempts by defamed individuals to win despite the Sullivan odds. Realizing that "malice" was not provably present, they still refused to accept the idea that a writer or editor could get away with character murder. Such "runaway juries" found news organizations guilty and stipulated large awards to defendants. The verdicts generally would be thrown out by judges and appeals courts, but only after greatly increased legal costs. For instance, one Texas appeals court overturned a $2 million jury award against the Dallas Morning News, finding that the jury had acted out of "passion and prejudice against newspapers." As law professor Marc Franklin put it, juries are "manifesting general

community resentment by imposing liability." [22]

Third, with runaway juries seeking a way to keep producers of defamatory falsehood from going free, trailblazing (or money-hungry) lawyers emerged. They began finding ways to circumvent restrictions on libel cases. Some brought right-to-privacy actions known as "false light." Others asserted that publications had unjustly enriched themselves by violating the property right that an individual holds to his own name. American ingenuity also came up with breach of implied warranty cases (a newspaper cheating its customers by representing as true information that which is false). [23]

Fourth, some judges, fascinated by jury uprisings, further encouraged such legal guerrilla warfare through their reluctance to issue summary judgments in libel cases. When Chief Justice Warren Burger chastised some judges in 1979 for being too quick to dismiss libel suits, the reluctance to issue summary judgments became general. More libel cases survived infancy. More legal bills accumulated. A 1986 Supreme Court decision, Anderson v. Liberty Lobby, tried to plug the hole in the dike by expanding a judge's discretion in making summary judgments, but the result of the new change is yet to be seen. [24]

With four squads of irregulars -- angry plaintiffs, sympathetic juries, resourceful lawyers, and even some curious judges -- not giving up in the face of Sullivan and its follow-up cases, news organizations and their insurers began suffering great financial losses. Cries of "if only" could be heard: If only plaintiffs would keep cool, if only jurors would abide by

the Sullivan decision, millions of dollars could be saved. But a Biblical verse well describes the irony of initial journalistic praise for the Sullivan decision, and later concern: "He who digs a pit falls into it." (Prov. 26:27)

Sullivan, in short, put in place a malice stop sign, rationalistically designed to free the press and prevent suits. That sign, though, has become an invitation to a Defamation Derby. One side must attempt to prove actual malice. The other side must stop that attempt. Both must examine and evaluate internal memoranda among reporters and editors, reporters' notes, or anything else that might show journalists had material available to indicate that what they published was not what they knew. Eighty percent of the expense of defending libel suits is now made up of attorney's fees, with the other twenty percent going for awards, settlements and administrative fees. Meanwhile, journalists feel pried into and preyed upon. They stop being writers or editors and start being witnesses.[25]

For instance, in a 1979 case, Herbert v. Lando, CBS documentary producer Lando was deposed in twenty-eight long sessions lasting, on and off, more than a year. Three thousand transcript pages and 240 exhibits were generated. In some sessions Lando had to pour over hundreds of his handwritten notes. In others, he had to go into detail about his thought process. CBS had to produce notes of interviews conducted with 130 people. Herbert had to produce more than 12,000 pages of documents. Lawyers had to examine them, with the meter ticking.[26]

Other utilitarian drawbacks of the Supreme Court's utilitarian decision also have emerged. Journalists complain of

intrusion into areas of editorial decisionmaking. They worry about attempts to compel identification of confidential sources. As long as Sullivan and its follow-ups were merely seen as sacrificing individuals in the "public interest," there were few calls for change. But when journalistic time and money began to be lost, there were agitated calls for extending the Supreme Court's barriers to libel trials even further. Some journalists proposed a granting of absolute privilege to journalists in cases involving public officials and public figures. Some wanted to do away with libel law entirely, giving journalists absolute freedom (as long as they could stay two steps ahead of those who would tar and feather them).[27]

Virtually all of the journalistic proposals viewed libel as a problem to be solved by standing on Times v. Sullivan and taking it either a bit further or much further. Perhaps it is time, though, to see Times v. Sullivan, and its supposed liberation of journalists from the consequences of actions that had been considered wrongful, as a wrong turn. Some libel law utilitarians are almost to the point of giving up in the face of shots and shells coming at them from so many different directions. Perhaps they are ready to learn the Biblical alternative.

The Biblical view of defamation

Defamation is taken very seriously in both the Old and New Testaments. At issue is slander, not libel, for the Bible describes primarily oral societies. If there is any ethical

difference between libel and slander, though, it seems evident that published or broadcast material should be treated even more harshly than local speechifying, because such material has a wider range and longer life-span.

The first slander reported in the Bible was that of Satan in his serpent form against God; the Greek word diabolis actually means slanderer. When Eve listened to and acted upon that slander, in conjunction with Adam, there were tragic consequences for mankind and the world in general. The slanderer was punished in two ways: The serpent thereafter had to crawl upon its belly, and Satan was told that he will one day be crushed by Christ, a woman's son.

Other Old Testament false defamations of public officials or public figures, such as Aaron and Miriam's slander of Moses (Num 14:36) also resulted in punishment. But it is not necessary to trace descriptive passages throughout the Old Testament, because the prescriptions could not be clearer. Exodus 23:1 declares, "Do not spread false reports," and Psalm 15:3 notes that the one who may enter God's sanctuary is he "who has not slander on his tongue." Punishment for false defamation is inescapable, as Proverbs 19:5 and 19:9 note: "A false witness will not go unpunished..."

Prophets did not hesitate to engage in truthful defamation of corrupt public officials and public figures. For instance, Jeremiah vigorously and publicly criticized the priest Pashhur, the false prophet Hananiah, and many others. (Jer. 20, 28, etc.) The seriousness of false defamation, though, was emphasized in Ezekiel's criticism of "slanderous men bent on shedding blood,"

(Ezek. 22:9) as well as in the Levitical injunction, "Do not go about spreading slander among your people. Do not do anything that endangers your neighbor's life. I am the Lord." (Lev. 19:16)

The New Testament similarly linked slander with other crimes. Jesus attacked "evil thoughts, murder, adultery, sexual immorality, theft, false testimony, slander." (Matt 15:19) Paul linked slanderers and God-haters, calling them "senseless, faithless, heartless, ruthless." (Rom. 1:30-31). In recent years, a certain amount of the "senseless, faithless, heartless, ruthless" has been seen as good for society, keeping public officials and public figures on their toes, but Paul had none of that. He noted that slanderers who remain unconverted not only keep up their slandering, but also provide ideological justifications for the practice, and approve of their colleagues in crime.

The Bible, clearly, takes false defamation more seriously than today's Supreme Court does: No involuntary victim is to be sacrificed for the supposed good of the people. Nor are there any grounds for a double standard, with public officials or public figures deprived of their rights: The Bible is filled with admonitions against unequal justice, whether it involves the showing of partiality to the insignificant or to the great. (Ex. 23, Lev. 19:15, etc.)

Today, we have unequal libel justice in two ways. First, we suffer from the distinction between public officials or public figures and private figures. Second, the frustration of jurors

becomes so great that when they can find a way to punish defamation, they are likely to load into one damage award all the damages juries could not award to others. One plaintiff goes away empty-handed; another, perhaps with no stronger case but with an imaginative lawyer and a jury foreman or strong-minded individual who can convince other jurors to "sock it to them," emerges millions of dollars richer (until the appeals court, at least).

If we adopted Biblical justice, we would have a much fairer libel law system. Biblically, journalistic false defamation tends to be midway between false witness and gossip. False witness in a court of law, where the issue literally may be life or death, is very serious; treated less severely, as far as civil penalty, is gossip or talebearing. Since libelous journalists are not actually prosecuting anyone -- they typically report on or draw conclusions from evidence supplied by sources -- they tend to be bearers of tales, not false witness.

However, lack of truthfulness makes libel a very serious offense. It can be looked upon upon as a form of theft: Stealing a person's reputation, perhaps injuring him in his business or causing other financial harm, and also causing mental suffering. Thieves, after all, take property, but libel robs victims of reputation and peace, perhaps repeatedly as defamatory falsehoods circulate. Penalties need to be serious enough to promote journalistic care and caution.

Biblical libel penalties

Biblical penalties for theft are well-defined, with the goal

of "making whole," not satisfying an itch for vengeance. Precise restitution, not arbitrary court adjudication, is the goal. Normally, thieves would have to pay back double the amount of property stolen. (Ex. 22:4,7). If they deprived their victim of his livelihood, they would have to pay back four or five times the amount stolen. (Ex. 22:1)

By applying the principle of multiple restitution to certain types of libel, we can ask the right questions. When Leonard Damron, the Florida public official sacrificed for the supposed good of the many, was damaged in his livelihood by libel, how much damage (including estimated loss of future earnings) did he sustain? When a Miss Wyoming who took chastity seriously had her sexual morality impugned, how much did that libel cost her?

The difficulty and partial irrelevance of that last question, though, indicates the difficulty of assessing many kinds of libel damages. Discussing reputational loss and psychological harassment in terms of dollars and cents is like mixing apples and oranges, or hatchets and hand grenades. But the Bible leaves no doubt that there can be financial penalties for such hard-to-measure damages. Deuteronomy 22:13-19 discusses the situation of a man who defames his wife by saying (in open discussion, not in a courtroom) that she was not a virgin upon their wedding day. If he is proven wrong in that assertion, he could be fined 100 shekels of silver (about 1 kilogram, or 2 1/2 pounds). That was a large amount in Biblical days, for the annual poll tax ranged from one third of a shekel (Neh. 10:32) to one-half (Ex. 30:15).

Such a serious defamation shows severe problems within a marriage, but the Biblical court proceedings that would follow such a charge are well worth considering. No depositions concerning state-of-mind are required. Obviously, the husband dislikes the wife, but the simple job of a defamed woman's parents is to "bring proof that she was a virgin to the town elders at the gate...her parents shall display the cloth before the elders of the town, and the elders shall take the man and punish him."

In this case, extreme though it is, resides a model for justice when defamation has occurred. There is no attempt to determine whether what Justice Brennan would call "actual malice" was present. In most cases, only God can know what a person was thinking. Mortals can see only visible evidence, such as blood on a sheet. We examine what is visible, and rest secure in the knowledge that God will do justice concerning what we cannot see. Applying this principle to current libel law, we could eliminate lengthy depositions concerning journalists' state of mind. Judges and juries simply could examine the published story. If it contained defamatory falsehood, an appropriate fine would be levied.

Fourth, such a fine could have two parts: One for direct economic injury, one for reputational injury. The latter would be harder to determine, because it depends not only on the particular charges made but on the way a particular society might regard those charges. (Imputation of unchastity might cause major damage in previous generations, and still would in Christian circles now, but might be of minor importance in other

social groups.) But whatever the precise penalty, the goal would be restitution in some multiple. If there were only minor damage from a falsely defamatory story, there would be a minor award.

If the Biblical view of libel became common, news organizations would have large incentives to take quick action when defamatory falsehoods were uncovered. Biblically, if a thief confesses and voluntarily offers restitution prior to trial, his penalty is only return of the stolen item or its equivalent, plus 20 percent, not 100, 400, or 500 percent. As Numbers 5:5-7 notes: "When a man or woman commits any wrong common to mankind and so is unfaithful to the Lord, that person is guilty and must confess the sin he has committed. He must make full restitution for this wrong, add one fifth to it and give it all to the person he has wronged."

Is this applicable to defamation? A parallel passage, Leviticus 6:2-5, gives specific detail on some of the offenses covered: If anyone "deceives his neighbor about something entrusted to him or left in his care or stolen, or if he cheats him, or if he finds lost property and lies about it, or if he swears falsely, or if he commits any such sin that people may do...He must make restitution in full, add a fifth of the value to it and give it all to the owner..." Applicable to many other times of crime, that passage also describes exactly what libelous reporters do: Maliciously or unwittingly, they twist words entrusted to them by interviewees, cheat the subjects of their articles, and state or imply that their defamation is true.

Such action demands harsh judgment. But the Leviticus and

Numbers passages also show God's mercy: If a person "commits any wrong common to mankind," or "commits any such sin that people may do." God understands our fallenness: It is the nature of man to sin. It is the nature of reporters to sin. This does not mean that the sins we commit are excusable: They are still sins. This does not mean that false defamation, even of public officials or public figures, is legitimate: It is still wrong. But just as punishment is mandatory in such cases, so punishment also is designed to teach, not annihilate. Using Biblical principles of libel law, almost all of the large jury awards of recent years would be greatly reduced.

Fifth, God is a god of both justice and mercy. Some may believe that God is too merciful at times: Should someone who has acted maliciously get away with such a mild penalty, if he decides the legal odds are against him and settles before trial? Matthew 7:1-2 is useful here: "Do not judge, or you too will be judged. For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you." It is very difficult for us to establish motive or to know exactly when a reporter knew that a statement was untrue. The Brennan dispensation attempts to make judges and juries godlike. Only God, though, knows what in inside men's hearts.

Exact measures of punishment will vary from society to society, but the Biblical principles remain valid. Falsehood always brings some punishment. The goal is restitution, including a penalty for the wrongdoer. Since the loss resulting from false defamation is more than economic, reputational consequences must be taken into account. Quick restitution can

save the thief much grief, as it can save the injured party much suffering.

Conclusion

At heart, libel is an ethical problem, not a legal one. The best way to deal with the libel problem is to train journalists to respect truth and never publish anything that has not been thoroughly checked and checked again. But, given our own fallenness and the congratulations for sin which are often forthcoming in a society where relativity reigns, the sword of the magistrate becomes crucial. Good libel law can push publications toward an emphasis on greater accuracy and fewer falsehoods. Legal penalties signal to both journalists and onlookers an understanding of what is right to do and what is not. Over time, the sword educates journalists, or wounds repeat offenders.

If we were to follow the Biblical model of libel justice, we would have speed, equal treatment for all, and restitution but not extravagance. With legal fees reduced by the elimination of depositions and discovery proceedings concerning malice, it is unlikely that libel expenses to news organizations would increase, but it is very likely that libel awards to worthy plaintiffs would be spread around more evenly. Falsehood would be taken seriously, but one transgression would not send a newspaper to bankruptcy court.

Some consequences are predictable. Since falsehood would be always punishable, newspapers would be more careful to check

accuracy. Fact-checkers would receive funds that now go to lawyers. Insurance companies would relate libel insurance rates to performance rather than circulation size, for a clear record of a newspaper's penchant for printing falsehood would be available.

Journalists, under Biblical libel structure, would be able to spend more time working and less time involved in litigation or the fear of it. They would be freed of deposition misery, since lawyers once again would have to look only at the actual published materials. Notebooks, tape recordings, outtakes, and reporters' files would not be pawed. Since there would be enormous advantages to quick correction of error, and no legal liabilities down the road from admitting error, newspapers would rush to make corrections and apologies as quickly as they can.

The most important change would be that some individuals would not have to be sacrificed for the supposed good of the many. Because quick and prominent retraction would eliminate the possibility of fourfold or fivefold restitution, the innocent could have their names cleared more quickly. Citizens would no longer be giving up their right to a good reputation (if earned) merely by taking part in public debate or by becoming public officials. We would have the Biblical pattern of objective justice tempered by the merciful opportunity to make quick correction.

Sadly, in 1986 journalists did not head toward the Biblical model of media law and ethics. Instead, the Supreme Court seemed willing to try tinkering once again. In one case, the Court (with Justice Rehnquist writing a dissent) even refused to grasp

a splendid opportunity to review Times v. Sullivan.

The case, Coughlin v. Westinghouse Broadcasting, was a blatant example of investigative reporting gone amuck. A television station, investigating the alleged failure of Philadelphia police to enforce state liquor laws, hid a camera across the street from the bar and videotaped police officers entering and leaving the bar. On October 11, 1981, policeman James Coughlin, carrying an envelope, entered the bar to investigate a vandalism complaint. Finding that all was quiet, Coughlin came out a minute later.

The television station ran film of Coughlin's entrance and exit, with a reporter saying, "the only paperwork we saw [Coughlin] doing was carrying this envelope out of the Club less than a minute after he went in." A freeze frame with a circle around the envelope emphasized the clear implication that Coughlin had accepted a bribe. Actually, the envelope contained Coughlin's incident report book. He sued and received judicial sympathy, but no redress, because of Times v. Sullivan. As one appeals court judge wrote, "the New York Times standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media."[28]

In a second case, Hepps v. Philadelphia Newspapers, the Supreme Court on a 5-4 vote ruled that a news organization even in dealing with a private figure could make defamatory statements of supposed fact that could not be proven. This time, Justice John Paul Stevens wrote a ferocious dissent, calling the decision

a "blueprint for character assassination... a wholly unwarranted protection for malicious gossip." Stevens added, "In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution."[29]

In another case, the afore-mentioned Anderson v. Liberty Lobby, the Court ruled that judges should have more power to dismiss (without benefit of jury trial) most libel charges against the press. The majority opinion, written by Justice Byron White, declared that libel suits filed by public officials and public figures in Federal courts must be dismissed before trial unless the evidence suggests plaintiffs can prove libel with "convincing clarity." White's language stressed the judge's right to decide whether a "fair-minded" or "reasonable" jury could side with the plaintiff. His opinion clearly was designed to reduce the opportunity for runaway juries to act in ways thought by journalists to be "unfair" or "unreasonable."[30]

It was unlikely that the decision would lead to speedier trials. As then-U.S. Court of Appeals Judge Antonin Scalia (whose opinion was overturned by the Supreme Court) noted, under the new standards "disposing of a summary judgment motion would rarely be the relatively quick process it is supposed to be." Scalia pointed out that the plaintiff would now have to "try his entire case in pretrial affidavits and depositions"; the defendant would also want to use all of his ammunition in response. The real difference would not be time and expense, but the movement of the trial from open court with jury to judge's chambers. Furthermore, it still seemed likely that smart lawyers would find a way around the latest attempt to stifle the

popular anti-press uprising.

Ironically, Justice William Brennan, while not backing away from his Times v. Sullivan decision, was in dissent this time. He complained that the Court majority's decision could "erode the constitutionally enshrined role of the jury." Brennan argued the decision would be seen as "an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would." A few reporters seemed to take Brennan's argument to heart, but even concerned journalists often said there was no choice if press freedom were to be saved.

But there is a choice. The Biblical model awaits us.

Notes

1 New York Times v. Sullivan, 376 U.S. 254 (1964).

2 Time, Feb. 4, 1985, 64; New York Times, Feb. 19, 1985, 1, Feb. 20, 1985, 13; James Goodale, "Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs," in Practicing Law Institute, MEDIA INSURANCE AND RISK MANAGEMENT (1985); Rodney Smolla, SUING THE PRESS (1986), 80-99, 198-237.

3 Pring v. Penthouse, 695 F. 2d 438 (10th Cir. 1982), 8 Med L. Rptr. 2409; New York Times, Dec. 10, 1984, p. 15; Smolla. id. at 160-181.

4 Randall Bezanson, Gilbert Cranberg, John Soloski, "Libel and the Press: Setting the Record Straight," The 1985 Silha Lecture, University of Minnesota, May 15, 1985, 26, 27.

5 Gannett Center for Media Studies, THE COST OF LIBEL (1986), 2-9; Michael Massing, "Libel Insurance: Scrambling for Coverage," Columbia Journalism Review, Jan./Feb. 1986, 35-38.

6 Id.; Michael Massing, "The libel chill: How cold is it out there?" Columbia Journalism Review, May/June 1985, 31-43; NEW YORK TIMES V. SULLIVAN: THE NEXT TWENTY YEARS (1984), 87, 450, 507, 527, 528.

7 Interviews by author at Gannett Ethics Conference, University of Kentucky, 1985.

8 Gannett Center, supra; Washington Journalism Review, Jan. 1986, 35.

9 Id.; Massing, "Libel Insurance," supra.

10 Interviews at Gannett Ethics Conference and at annual convention of the Association for Education in Journalism and Mass Communication, Norman, Oklahoma, 1986.

11 New York Times v. Sullivan, supra.

12 St. Amant v. Thompson, 390 U.S. 727 (1968).

13 Schauer, "Public Figures," 25 William and Mary Law Review, (1984), 905, 910.

14 Ocala Star-Banner Co. v. Damron, 401 U.S. 285 (1971); cited in Schauer, id.

15 Kruteck v. Schimmel, 27 A.D. 2d 837, 278 N.Y.S. 2d 25 (N.Y. Appl. 1967); Clawson v. Longview Pub. Co., 91 Wash. 2d 408, 589 P. 2d 1223, 4 Med. L. Rptr. 2163 (1979); McMurry v. Howard Pub., Inc., 612 P. 2d 14, 6 Med. L. Rptr. 1814 (Wyo.

1980); Press Inc. v. Verran, 569 S.W. 2d 435, 4 Med. L. Rptr. 1229 (Tenn. 1978).

16 Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For more on the logic of extension from public official to public figure, see Daniels, "Public Figures Revisited," 25 William and Mary Law Review (1984) 957, 965.

17 Lawrence v. Bauer Pub., 89 N.J. 451, 446 A. 2d 469 (1982); Cloyd v. Press, 629 S.W. 2d 24 (Tenn. App. 1981); Wright v. Haas, 586 P. 2d 1093 (Okla. 1978); Exner v. AMA, 12 Wash. App. 215, 529 P. 2d 863 (1974)

18 Lawrence v. Bauer Pub., id.

19 Id.

20 See Goodale, "Centuries of Libel Law Erased by Times-Sullivan," 191 New York Law Journal 49 (1984).

21 Bezanson et al., supra. at 9.

22 Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal," 18 U.S.F.L. Rev. 1, 10 (1983)

23 For examples, see Libel Defense Resource Center Bulletin #11, Summer-Fall 1984, 1,2.

24 Anderson v. Liberty Lobby, 12 Med. L. Rptr. 2297 (1986)

25 THE COST OF LIBEL, supra. at 3; Ethics Workshop interviews.

26 Herbert v. Lando, 441 U.S. 153 (1979).

27 Congressional Record, July 24, 1985, E3478; Floyd Abrams, "Why We Should Change the Libel Law," New York Times Magazine, Sept. 29, 1985, 34, 87, 90-92.

28 Coughlin v. Westinghouse Broadcasting, 12 Med. L. Rptr. 2263 (1986).

29 Hepps v. Philadelphia Newspapers, 12 Med. L. Rptr. 1977 (1986).

30 Anderson v. Liberty Lobby, supra.